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Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, ET AL.,
Petitioners,

vs.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE AND THE DEMOCRATIC NATIONAL COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE

Amicus Curiae Republican National Committee ("RNC") is the national political organization and governing body of the Republican Party of the United States.[1] *Amicus Curiae* Democratic National Committee ("DNC") is the national political organization and governing body of the Democratic Party of the United States. The RNC and DNC are filing this joint brief on behalf of their respective parties because they both strongly believe in the right of the Republican and Democratic parties to organize and operate in the way they believe best serves their respective beliefs and interests.

The RNC and DNC believe that California's Proposition 198 unconstitutionally interferes with the ability of party organizations to determine who will participate in the selection of the parties' nominees for public office and how the internal affairs of the parties will be structured. The RNC and DNC both provide a valuable perspective on this issue because they can address the severe impact of Proposition 198 not only on the state and local Republican and Democratic parties, but also on the two parties' national nominating conventions.

Strong party organizations bolster our democracy, and each party will be strengthened and will function most effectively if the selection of the parties' nominees for

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici* made a financial contribution to the preparation or submission of this brief.

elected office is limited to voters who qualify under party rules. California's Proposition 198, the "Open Primary Act," precludes the parties from limiting the selection of nominees in this way in California, and therefore impairs the ability of the party organizations to operate in the manner that they have decided best serves their interests.

In particular, Proposition 198 directly conflicts with the rules of the RNC and DNC for selection of delegates to their national presidential nominating conventions. Although the rules of the RNC and DNC differ in a number of respects, both sets of rules require that the delegation to the convention from each state reflect the preference of party adherents in that state as to whom should be the party's nominee for President of the United States. Proposition 198 prevents the parties from implementing that rule with respect to the California presidential preference primary, because Proposition 198 permits all voters, regardless of registration, to choose between all candidates for president running in all of the various political parties, on a single ballot.

Further, the national convention of each party serves as the highest governing authority of that party, with power to adopt and amend the party's internal governing structure, principles and rules. In a manner contrary to party rules, Proposition 198 permits voters from other parties to select delegates from California who are empowered to act on these fundamental matters of internal governance of each party. Such a result would seriously undermine the Republican and Democratic parties' ability to organize and operate in the way they believe best serves their respective interests.

Because of the conflict between Proposition 198 and the DNC and RNC rules, the California legislature enacted a law requiring the Secretary of State to report the number of

votes cast for each candidate in the presidential preference primary by all voters, and separately to report the number of votes each candidate received from voters registered with each party. Cal. Elections Code § 15375(c)(1999), as amended by California Senate Bill 100, section 2 (1999). Under this system, the California Democratic Party will be provided with an official tally of the number of votes cast for each Democratic presidential candidate by registered Democratic voters, and the California Republican Party will be provided with an official tally of the number of votes cast for each Republican presidential candidate by registered Republican voters. This tally will then be used by each party to allocate delegate positions among its respective presidential candidates.

Thus, on March 7, 2000, there will effectively be two elections held at the same time, on the same ballot: the blanket primary mandated by Proposition 198, the results of which will have no meaning or effect with respect to the allocation of delegates, and the actual vote of registered Democrats for Democratic presidential candidates and registered Republicans for Republican presidential candidates, which will be used to allocate delegate positions for each party's national convention.

STATEMENT OF THE CASE

I. REPUBLICAN NATIONAL COMMITTEE

The Republican National Committee ("RNC") is an unincorporated association created and governed by the Rules of the Republican Party ("Republican Party Rules"). The RNC, comprised of an elected national committeeman, national committeewoman, and state party chair from each state and territory, is the governing body of the Republican Party at the national level, subject to direction from the delegates who convene during the quadrennial national convention. The RNC is involved in getting Republicans elected to public office across the United States at the federal, state and local level, and in promoting the Republican philosophy to the American electorate.

It is important to note the critical functions performed by the Republican National Convention. In addition to nominating the Republican candidates for President and Vice President of the United States, the national convention promulgates the Republican Party Rules and the platform of the national party, which sets forth the guiding principles of the Republican party. The national convention is the only body with the authority to adopt and amend the Republican Party Rules and party platform. The RNC must operate under the Republican Party Rules, as adopted, for the following four years until the next national convention. Therefore, delegates to the national convention are the ultimate arbiters of the Republican party's internal affairs.

A. Delegate Selection Procedures Under Republican Party Rules.

Republican Party Rule 32 governs the selection of delegates to the Republican National Convention. Under this Rule, state law has precedence over state party rules with respect to the establishment of the selection process. *Id.* at 32(a). Each state, and each state Republican party if state party rules govern the selection process under state law, is permitted to determine the method of selecting its delegates. These methods traditionally include direct primaries, conventions and caucuses, or a combination of both.

Participation in these processes shall in no way be abridged for reasons of sex, race, religion, color, age, or national origin. Furthermore, the RNC and state parties are encouraged under Republican Party Rules to achieve the broadest possible participation by men and women, young people, minorities, heritage groups, senior citizens, and all other citizens in the delegate selection process. Republican Party Rule 34(b).

Under Republican Party Rules, states and state parties were permitted to make material changes to their delegate selection procedures up until July 1, 1999. The California Republican Party certified that its delegate selection procedures for the 2000 national convention would be governed by a combination of state law and state party rules. Under California law, there will be a separate tabulation of votes cast by registered Republican voters for Republican presidential candidates at the March 7 presidential primary. Cal. Elections Code § 15151(a)(3). Those Republican results are then used by the California Republican Party when it convenes the District Conventions and State Convention to

select delegates and alternates to the national convention. California Republican Party Bylaws §§ 6.02 – 6.06.

B. Prohibition on Blanket Primaries.

Rule 32(b)(9) prohibits the selection of delegates to the Republican National Convention through blanket primaries. If state law provides for the selection of national convention delegates by blanket primary, then such delegates must be elected by state party-run congressional district or state conventions as outlined in Rule 32(c). *Id.*

The Republican Party Rules also prohibit blanket primary elections for the selection of Republican nominees. Specifically, Rule 34(f) prohibits the recognition of any state party rule or state law that provides for blanket primary elections. No person nominated under such a regime can be recognized by the RNC as the nominee of the Republican Party. *Id.* If a state selects nominees by blanket primary, the Republican nominee must be selected by a state party-run convention process as specified in Rule 32(c), unless a state party rule provides specifically to the contrary. *Id.*

Rule 32(c) delineates the convention selection process under the Republican Party Rules. If a convention method is used, only voters deemed to be Republicans may participate in the selection of nominees or delegates to the national convention.

II. DEMOCRATIC NATIONAL COMMITTEE

Under the Charter of the Democratic Party of the United States ("Charter"), the Democratic Party is required to assemble in a national convention each year in which an election for the office of President of the United States is to be held. Charter, Article Two, § 1. The National Convention is the "highest authority of the Democratic Party," with power to recognize state party committees as official organizations of the Democratic Party, nominate candidates for the offices of President and Vice President of the U.S., adopt a platform and act on such other matters as it deems appropriate, *Id.*, Article Two, § 2, which may include amendments to the party's Charter and Bylaws. *Id.*, Article Ten, § 1.

The Democratic National Committee ("DNC") has general responsibility for the affairs of the Democratic Party between conventions. *Id.*, Article Three, § 1. The DNC, founded 150 years ago, is an unincorporated association consisting of the national officers of the DNC, the chair and highest ranking officer of the opposite sex of each state party organization, 200 additional members apportioned to the states on the basis of population and Democratic voting strength, representatives of certain party organizations, and 75 at-large members elected by the remaining members. *Id.*, Article Three, § 2. The total membership of the DNC now stands at 446.

A. The Presidential Nominating Process Under DNC Rules.

The selection of delegates to each Democratic National Convention is governed by Delegate Selection Rules, which are adopted by the full DNC and have the

status of party bylaws. The selection of delegates to the 2000 Democratic National Convention is governed by the 2000 Delegate Selection Rules, which were adopted by the DNC at a meeting held in Washington, D.C. on May 9, 1998.

The rules for selecting delegates, administered by the DNC, impose several basic requirements on the state parties:

- The nominating process must be fair, open and free from discrimination based on race, religion, national origin, or gender (Delegate Selection Rules for the 2000 Democratic National Convention, Rules 4 and 5).
- Delegations from each state must largely consist of delegates pledged to a particular presidential candidate, and these pledged delegate positions must be allocated proportionately based on the results of a primary or caucus in which all Democratic voters -- but only Democratic voters - can participate. *Id.* Rules 2A-C; Rule 12.
- The selection of persons to fill these pledged positions must be made through a fair and open process in which supporters of each presidential candidate can choose the delegates to represent that candidate at the Convention *Id.* Rule 11.
- The timing of the first stage of delegate selection (primary or first-tier caucus) is limited, with Iowa and New Hampshire being allowed to hold their events first, Maine next, and all other state parties being forbidden from holding binding nominating events prior to the first Tuesday in March. *Id.* Rule 10A.

Those voting in the California presidential primary effectively choose the presidential candidate to whom delegates to the 2000 Democratic National Convention will be pledged. Delegate positions are allocated in proportion to the percentage of the vote won by each presidential

candidate. In 2000, the presidential preference primary will be held on March 7, 2000.

On January 23, 2000, the California Democratic Party held congressional district meetings, or caucuses, open only to registered Democrats, to choose a slate of persons committed to each candidate. California Delegate Selection Plan for the 2000 Democratic National Convention. For example, if five district-level delegates to the national convention are to be chosen from a particular congressional district, and there are two presidential candidates, X and Y, five persons were slated for each candidate at the January 23 caucuses.

If candidate X then wins 40% of the vote in the presidential primary on March 7, candidate X will be awarded 40% of the five district-level delegate positions, or two district-level delegate positions. The top two vote-getters slated in the January 23 caucuses will be assigned those positions, and will thus be credentialed to attend the 2000 Democratic National Convention as district-level delegates pledged to presidential candidate X. *Id.* This process will be used to allocate and fill 239 district-level delegate positions from California. The results of the primary will also be used to allocate, among the Democratic presidential candidates, 48 pledged party leader and elected official delegate positions and 80 at-large delegate positions from California. *Id.*

B. Prohibition on Open and Blanket Primaries.

In devising the Delegate Selection Rules for the 1988 Democratic National Convention, a DNC commission recommended, and the DNC adopted, a rule which granted "grandfather" exemptions for two states that already used

open primaries -- Wisconsin and Montana -- but which forbade any other state Democratic Party from future use of a delegate selection process open to voters other than registered or publicly-declared Democrats. That rule, which has remained in effect for the 1992, 1996, and 2000 Conventions as well as the 1988 Convention, provides that:

2 A. Participation in the delegate selection process shall be open to all voters who wish to participate as Democrats. Implementation of this administrative matter shall be delegated to the DNC Rules and Bylaws Committee.

2 B. Nothing in these rules shall be interpreted to encourage or permit states with party registration and enrollment, or states that limit participation to Democrats only, to amend their systems to open participation to members of other parties.

Since 1980, no state Democratic Party other than those in Wisconsin and Montana has been permitted to undertake the selection of delegates through a process open to Republicans. Any delegate selection plan that provided for selection of delegates through a blanket primary like that mandated by California's Proposition 198 would be disapproved by the DNC's Rules and Bylaws Committee; any delegation from California chosen through such a process would be subject to a credentials challenge at the national convention. Delegate Selection Rules, Rule 19B.

SUMMARY OF ARGUMENT

The California Republican and Democratic parties strongly believe that participation in their party primaries should be limited to individuals qualified to vote under party rules. Consistent with this judgment, the rules of the national Republican party prohibit the seating of any delegate at the national convention who is selected by voters not eligible to vote under party rules. As explained above, the rules of the Democratic party contain similar provisions. Republican Party Rules also prohibit the RNC from recognizing and financially assisting any nominee for public office who is chosen by voters who have participated or are participating in another party's primary. These decisions by the state and national Republican and Democratic parties reflect their fundamental views about how their nominees for public office and delegates to the national convention should be selected and how their parties' internal affairs should be structured.

In the face of these collective decisions by the Republican and Democratic parties, the State of California, through Proposition 198, seeks to allow voters to cross-vote in the parties' primaries without requiring any type of voter commitment to a particular party. California's attempt to substitute its own judgment for that of the state and national parties is unquestionably a severe burden on the fundamental First Amendment associational rights of the Republican and Democratic parties.

Under binding Supreme Court precedent, any state interference with a political party's internal decision-making -- including a party's decision on who should participate in selecting its nominees for public office -- is constitutionally suspect as a matter of law. Because California has not

shown and cannot show that Proposition 198 serves any compelling state interest, it is unconstitutional. Proposition 198 fails to serve even a legitimate interest, acting only to abridge the protected will of the parties to control their own destiny, and creates a confusing and divisive conflict with the rules of the RNC and the DNC. Accordingly, this Court should reverse the Court of Appeals and declare Proposition 198 unconstitutional under the First Amendment.

ARGUMENT

I. UNDER THE FIRST AMENDMENT, POLITICAL PARTIES HAVE A FUNDAMENTAL RIGHT TO FREEDOM OF POLITICAL ASSOCIATION.

While the Constitution grants broad powers to the states to regulate the conduct of elections, these powers are not without limitation. Under Art. I, § 4, cl. 1, the states have the power to prescribe the "Times, Places and Manners of holding elections . . ." for public office. However, "[t]he power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as . . . the freedom of political association." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986).

Freedom of association in the context of political parties means not only that an individual voter can associate with the political party of his or her choice, but also that political parties themselves have fundamental rights. In this regard, this Court has recognized that political parties have the right to "'identify the people who constitute the association,'" *Id.*, 479 U.S. at 214 (quoting *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981), and to select a "standard bearer who best represents the party's ideologies and preferences." *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 601 (D.C. Cir. 1975) (Tamm, J., *concurring in result*), *cert. denied*, 424 U.S. 933 (1976).

When determining whether a state election law violates First and Fourteenth Amendment associational rights, this Court has established the following test:

Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "important regulatory interests" will usually be enough to justify "reasonable, nondiscriminatory restrictions." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (citations omitted). When a state law interferes with a political party's internal decisions and policies about how to conduct and organize its affairs, this Court and lower courts have ruled that such a law is subject to strict scrutiny. *See, e.g., Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989); *Republican Party of Ark. v. Faulkner County*, 49 F.3d 1289, 1294 (8th Cir. 1995) ("the internal affairs of political parties are off-limits to state regulation, unless the state finds it necessary to meet a compelling [state] interest").[2]

As a matter of law, Proposition 198 imposes not merely a "significant" burden, but a *severe* burden on the associational rights of the political parties. In upholding the California law, the Court of Appeals' decision vitiates the ability of political parties to make the internal decision of who will participate in the selection of the party's nominee to

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[2] State election laws that regulate general election or ballot access matters do not necessarily severely burden the core First Amendment rights of political parties because they are "necessary to the successful completion of a party's external responsibilities in ensuring the order and fairness of elections." *Eu*, 489 U.S. at 231-32 (emphasis added). For example, in *Timmons*, a minor political party challenged the constitutionality of an antifusion law which prohibited candidates from appearing on the ballot as the candidate of more than one party. 117 S.Ct. at 1364. *See also Storer v. Brown*, 415 U.S. 724 (1974); *Burdick v. Takushi*, 504 U.S. 428 (1992). Accordingly, unlike state attempts to regulate internal party matters, state regulation of external party affairs may not trigger strict scrutiny.

elective office. Therefore, Proposition 198 is unconstitutional unless it survives strict scrutiny.

A. Under the First Amendment, Political Parties Have the Fundamental Right to Identify the Memberships of Their Associations.

"[A] State cannot substitute its judgment for that of the party as to the desirability of a particular internal party structure. . . ." *Eu*, 489 U.S. at 233. "[T]he stringency, and wisdom, of membership requirements is for the association and its members to decide -- not the courts -- so long as those requirements are otherwise constitutionally permissible." *LaFollette*, 450 U.S. at 124 n.25.[3]

Freedom of association means that a political party has the right to "identify the people who constitute the association . . . and to select a standard bearer who best represents the party's ideologies and preferences." *Eu*, 489

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[3] It is important to distinguish the issues involved in the present case from those involved in *Lightfoot v. Eu*. 964 F.2d 865 (9th Cir. 1992). In *Lightfoot*, the Ninth Circuit upheld a California law that requires political parties to nominate their candidates by direct primary, even if it violates party rules. Determining which nominating system to use is analytically distinct from the constitutional right of political parties to define their associations. The nominating system issue goes to how a party selects its nominees for inclusion on the general election ballot. *See id.* at 872 (citing *American Party of Tex. v. White*, 415 U.S. 767 (1974)). By contrast, Proposition 198 seeks to dictate who may participate in a party's nomination process. Insofar as *Lightfoot* involved the issue of who may elect nominees, California conducted closed primaries at the time which merely expanded the universe of eligible voters from nominating convention participants to registered party members. Therefore, Proposition 198 is analytically distinct from the law at issue in *Lightfoot*.

U.S. at 224 (internal quotations and citations omitted). This freedom includes the right to determine the boundaries of the association and the structure which best allows the party to pursue its political goals. *Tashjian*, 479 U.S. at 224. To this end, the courts have invested political parties with wide discretion to structure their internal governance and activities. *Republican Party of Ark.*, 49 F.3d at 1294.

Moreover, the courts have recognized that the inclusion of unaffiliated voters may distort the collective decisions a political party makes during primary elections. *See LaFollette*, 450 U.S. at 122 ("On several occasions this Court has recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions -- thus impairing the party's essential functions -- and that political parties may accordingly protect themselves 'from intrusion by those with adverse political principles'") (citations omitted). Accordingly, a state "may enact laws to prevent the disruption of political parties from without, but not . . . laws to prevent the parties from taking internal steps affecting their own process for the selection of candidates." *Eu*, 489 U.S. at 227 (emphasis added).

Consistent with these principles, this Court has protected the core associational right of political parties to identify the boundaries and memberships of their associations. In *Tashjian*, for example, the Court ruled that a Connecticut statute providing for a closed Republican primary -- one in which only registered Republicans could participate -- was unconstitutional where the state's Republican Party had adopted a rule opening the primary to registered independents, i.e., voters not registered with either major party. The Court's holding was not based on the unique burdens placed by a closed primary on the party's associational rights. Rather, it was based on the broad

principle that a state law that dictates who may participate in a party's nominating process over the objection of the party severely burdens the rights of that party and its adherents. *Tashjian*, 479 U.S. at 214, 215-16.

Proposition 198 prevents political parties from associating with whomever they choose at "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian*, 479 U.S. at 216. The California Republican and Democratic parties and the national parties have determined that only qualified voters under party rules should participate in their nomination processes. The RNC and DNC believe that participation in a nomination process, whether by direct primary, convention, or another permitted method, should be limited to voters who are willing to participate in only one party's primary.

Limiting participation in the nominating process in such a manner does not enhance intraparty factionalism or make candidates more beholden to one internal constituency over another. Rather, it provides competing forces within the party an opportunity to engage in an internal conversation with party members so that the members can achieve a resolution in anticipation of the general election. "A primary is not hostile to intraparty feuds; rather it is an ideal forum in which to resolve them." *Eu*, 489 U.S. at 227. In sum, the political parties merely want to exercise their core First Amendment rights by settling internal differences within the party itself, free from intrusion by voters who are unwilling to commit to just one party's primary.

If the political parties want to invite unaffiliated voters to participate in the resolution of internal matters, that is a choice for the *parties* to make, not the state. *See*

LaFollette, 450 U.S. at 122 n. 22 ("'Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.'") (quoting L. Tribe, *American Constitutional Law* at 791 (1978)).

Consistent with this reasoning, the RNC has promulgated rules that prohibit blanket primaries. In particular, RNC Rule 34(f) prohibits the RNC from observing any state party rule or state law that provides for blanket primaries. The RNC cannot recognize any person nominated in violation of that Rule as the nominee of the Republican party for any federal, state or local office. *Id.* This rule further provides that if there is a violation of the Rule, the Republican nominees must be selected by a convention process, unless a state party rule provides specifically to the contrary. *Id.* Such conventions allow only Republican voters to participate in the selection of the nominees. *Id.* at 32(c). Accordingly, from the perspective of the RNC, it is possible for California to have two sets of outcomes as a result of a blanket primary election: one the result of the blanket primary and the other the result of the state party's Republican nominating convention. From the perspective of the DNC, under California law, the blanket primary nominee for an office other than President is granted automatic access to the general election ballot, even though such nominee may not be the choice of Democratic voters.

Proposition 198 severely burdens the rights of the RNC because the nominee recognized under its rules may not be the one nominated by the state's blanket primary. For a federal, state or local office other than President, the blanket primary nominee will be designated on the general election ballot as the nominee of the party, despite the fact

that the party, under its rules, may have nominated another candidate. Under that scenario, the actual nominee of the party would not be included on the general election ballot. Therefore, Proposition 198 severely burdens political parties because they may have to choose between the candidate with access to the general election ballot and the actual nominee of the party. This "choice" creates a severe and unconstitutional burden on the associational rights of the parties.

B. Interfering with the Parties' Ability to Determine the Makeup of a Delegation to the Parties' National Nominating Conventions Imposes a Particularly Severe Burden on the Parties' Rights of Association.

The associational rights of the parties are especially strong in the context of selection of delegates to their national nominating conventions. The RNC Rules have a prohibition on blanket primaries in this context as well. *See* RNC Rule 32(b)(9). "The right of members of a political party to gather in a national political convention in order to formulate proposed programs and nominate candidates for public office is at the heart of the freedom of assembly and association. . . ." *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975) (Rehnquist, J., concurring). "A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution." *LaFollette*, 450 U.S. at 124. "The States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice Presidential candidates." *Cousins*, 419 U.S. at 489-90.

For these reasons, this Court and lower federal courts have consistently held that state statutes attempting to dictate the process by which the national parties select delegates to their national nominating conventions severely burden the associational rights of the national parties, and must be deemed unconstitutional absent a compelling state interest. *See, e.g., LaFollette, supra*; *Wymbs v. Republican State Executive Comm. of Fla.*, 719 F.2d 1072 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984); *Ferency v. Austin*, 666 F.2d 1023 (6th Cir. 1981); *Ripon Society v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976).

In particular, it is well-established that states cannot force a national convention to seat delegates selected through an open primary who are bound to vote in accordance with the open primary's results when national party rules require delegates to be selected only by party members. *LaFollette*, 450 U.S. at 126. Moreover, in *Cousins*, the 1972 Democratic National Convention Credentials Committee had upheld a challenge to the Illinois delegation based on violations of DNC rules, and seated a rival delegation. An Illinois court ordered the official delegation seated because it had been selected in accordance with state law. The Court overturned that action, ruling that the party had the constitutional right to seat delegates in accordance with its own rules despite a contrary state law. *Cousins*, 419 U.S. at 490-91. Similarly, in *Ferency v. Austin, supra*, the court held unenforceable a Michigan statute requiring that delegates to national conventions be selected through an open primary, when DNC rules required the state party to use a process limited to declared Democrats. The court ruled that the statute could not be enforced to "control the method of selection of Michigan delegates" to the convention. *Ferency*, 666 F.2d at 1025.

In this case, California law provides that delegates to the Republican and Democratic National Conventions will be selected in accordance with the results of the presidential preference primary as certified by the Secretary of State. Cal. Elections Code § 6300 *et seq.* (governing Republican presidential primary) and § 6000 *et seq.* (governing Democratic presidential primary). It is clear that the California statutory scheme could not constitutionally be enforced to require the DNC or RNC to seat delegates chosen in a blanket primary, in violation of the parties' national rules.

The Court of Appeals correctly noted that, precisely because the RNC and DNC rules prohibit use of a blanket primary for delegate selection, "the California parties may be forced to adopt a different procedure for delegate selection other than the presidential primary. . . . " *California Democratic Party v. Jones*, 169 F.3d 646, 659 (9th Cir. 1999). The Court of Appeals suggested that the parties can make this choice "as they please without interference from the State." *California Democratic Party v. Jones*, 169 F.3d at 659.

In fact, as noted above, because of the conflict of Proposition 198 and national party rules, the California legislature enacted a law requiring the Secretary of State to report the number of votes cast for each candidate in the presidential preference primary by all voters, and separately to report the number of votes each candidate received from voters registered with each party. Cal. Elections Code § 15375(c). The separate official tally of the number of votes cast for each Democratic presidential candidate by registered Democratic voters will be used by the California Democratic Party to allocate national convention delegate

positions from California among the Democratic presidential candidates. Similarly, the separate, official tally of the number of votes cast for each Republican presidential candidate by registered Republican voters will be used by the California Republican Party to allocate national convention delegate positions from California among the Republican presidential candidates.

Thus, on March 7, 2000, there will effectively be two elections held at the same time, on the same ballot: the blanket, open primary mandated by Proposition 198, the results of which will be meaningless with respect to selection of delegates to the national conventions; and the actual votes of registered Democrats for Democratic presidential candidates and registered Republicans for Republican presidential candidates, which will be used to allocate delegate positions to the national nominating conventions.

Contrary to the suggestions of the Court of Appeals, the blanket primary mandated by Proposition 198 does represent interference by the State of California in the parties' delegate selection processes. The holding of two elections on the same ballot, on the same day, with two different results, will necessarily sow great confusion among voters and could undercut public acceptance of the results of the party-run process. For example, presidential candidate X could win, among all candidates of his political party, in the blanket primary, while presidential candidate Y could win among voters registered with that party and thereby actually win more delegates. For the State of California to create such confusion, and undermine the public credibility of the vote used by the party to award national convention delegates, is a direct interference by the state with the parties' constitutionally-protected right to "select a 'standard bearer who best represents the party's ideologies and

preferences.'" *Eu*, 489 U.S. at 224, citing *Ripon Society*, *supra*, 525 F.2d at 601.

As a matter of law, then, any effort by California to enforce its current statutes requiring the California Republican and Democratic Parties to select their delegates to the national nominating conventions through a binding primary would impose a severe burden on the associational rights of the RNC and DNC.

II. PROPOSITION 198 DOES NOT SERVE ANY COMPELLING STATE INTEREST AND, THEREFORE, IS UNCONSTITUTIONAL.

A. The State Has No Compelling Interest in Protecting the Political Parties From the Consequences of Their Own Internal Governance Decisions.

The interest asserted by the state and recognized by the Court of Appeals is that "Proposition 198 . . . enhances the democratic nature of the election process and the representativeness of elected officials," by allowing independents and members of other parties to help "frame[] the choice that they will ultimately have to make in the general election." *California Democratic Party*, 169 F.3d at 660.

This Court has rejected state interests analogous to those offered to justify Proposition 198. For example, in *Eu* the Court rejected the proffered state interests in the democratic management of a political party's internal affairs and preventing regional friction within a party from reaching critical mass. *Eu*, 489 U.S. at 232-33. Moreover, in *Tashjian*, the Court rejected the purported state interests of

avoiding voter confusion, protecting the integrity of the two-party system, and protecting the integrity of the party against the party itself. *Tashjian*, 479 U.S. at 217-25. The Court noted that the state law at issue was supposedly designed "to save the Republican Party from undertaking a course of conduct destructive of its own interests. But on this point 'even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party.'" *Id.* at 224 (quoting *LaFollette*, 450 U.S. at 123-24). "In sum, a State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure an election that is orderly and fair." *Eu*, 489 U.S. at 233.

The purported state interest of enhancing the representativeness of elected officials is not sufficient enough to justify a law that regulates who may participate in the parties' primary elections. Primaries are the critical means by which political parties select their candidates for public office. When competing for a party's nomination, candidates must and should court the voters qualified to participate in that party. This is an essential aspect of a party's First Amendment right of association. Parties hold their nominees out to the general voting public as the standard bearers of the party. Accordingly, the states have "no interest in protecting the integrity of the Party against the Party itself." *Eu*, 489 U.S. at 232 (citing *Tashjian*, 479 U.S. at 224). There is "no reason why the government should be any more able to tell the Republican Party how to choose its leaders than to tell the Mormon Church how to choose its elders." Antonin Scalia, *The Legal Framework for Reform*, Commonsense, V. 4, No. 2. (1981).

Admittedly, the states do have a strong interest in preserving the stability and effectiveness of political parties

by allowing them to settle intraparty disputes by holding primary elections. *See, cf., Storer v. Brown*, 415 U.S. 724, 735 (1974) ("The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences."); *Timmons*, 117 U.S. at 1374 (strong interest in the stability of the political process is not a "paternalistic license for States to protect political parties from the consequences of their own internal disagreements") (citations omitted); *Eu*, 489 U.S. at 227 ("Our decision in *Storer*, however, does not stand for the proposition that a State may enact election laws to mitigate intraparty factionalism during a primary campaign."). Primaries are one of the internal mechanisms that ensure the fair and orderly resolution of intraparty competitions. However, the state has no interest, let alone a compelling one, in protecting candidates from such intraparty competitions by diluting the power of party adherents through the forced inclusion of unqualified voters.

B. By Conflicting With Party Rules, Proposition 198 Creates Intra-Party Conflict and Confusion, Precluding any Finding of a Compelling State Interest.

Rather than enhancing the representativeness of elected officials as noted, Proposition 198 creates disturbing conflicts under existing party rules, forcing confusion and disenfranchisement among voters. Under RNC Rules, Proposition 198 does not enhance the democratic nature of the election process, because the RNC is prohibited from recognizing nominees selected by blanket primary or from recognizing delegates selected through such a primary. *See* RNC Rules 34(f) and 32(b)(9). Rather, as explained above, the RNC would recognize the nominee selected by a state

party-run convention process. And the delegates from California to the parties' national presidential nominating conventions will be awarded through state party-run district and state conventions based on the separate tally of voters registered with each party, rather than based on the overall results of the blanket primary.

Thus, the blanket primary does not in fact allow independents and members of other parties to participate in "framing the choice" of the nominee of the Republican Party for President, because the votes of those independents and members of other parties literally do not count in choosing the nominee. The exact same is true of the Democratic Party. To offer California voters such an illusory, meaningless exercise – one that does not in fact affect the selection of the party's nominee – hardly enhances the representativeness or democratic nature of the election process. To the contrary, the State of California has no interest at all, let alone a compelling one, in sponsoring such a meaningless, non-binding process.

For this reason, too, the state has no compelling interest that justifies the severe burden that would be imposed by Proposition 198 on the fundamental First and Fourteenth Amendment rights of the RNC and DNC and their state party organizations.

CONCLUSION

For all the foregoing reasons, the RNC and DNC, as *amici curiae*, respectfully submit that this Court should reverse the judgment of the Court of Appeals and declare that Proposition 198 is unconstitutional under the First and Fourteenth Amendments.

Respectfully submitted,

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